House of the Good Samaritan *and* John A. Stano. Case 3–CA–18065

December 21, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On July 26, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, House of the Good Samaritan, Watertown, New York, its officers agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(c) and (e), and reletter the subsequent paragraphs.

''(c) Mail a copy of the attached notice marked ''Appendix''[3] to each former striking employee who selected the severance option of the Strike Settlement Agreement at his or her home address and post copies thereof at Respondent's place of business in Watertown, New York. Copies of the notice on forms provided by the Regional Director for Region 3 shall be signed by the Respondent's authorized representative and posted by it immediately upon receipt for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In view of the judge's finding, which we adopt, that the Respondent's discharge of John A. Stano was actually motivated by Stano's protected strike activities, we find it unnecessary to pass on whether there is a violation under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

For the reasons set forth by the judge, Member Browning finds that the Respondent's discharge of Stano was unlawful under both tests of the *Great Dane* analysis, as well as under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), affd. in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] We see no need for the special modification requirement set forth in par. 2(c) of the judge's Order. In our view, it is sufficient that the Respondent mail to each former employee, who selected the severance option, a copy of the notice.

Member Browning would not modify the judge's recommended Order, but rather would affirm his recommended remedy that the Respondent be ordered to ''inform, in writing, each of its former employees who selected the severance option of the Strike Settlement Agreement that they are not ineligible for reemployment by Respondent solely because they selected this option.'' In her view, the former employees affected by the Respondent's unlawful action would be more likely to read and take note of such message that is specifically directed to their situation, than they would of an official Board notice that contains many other provisions that might not appear as relevant to them. Thus, she agrees with the judge that a specific notice should be mailed to each affected former employee, rather than just the Board notice, as her colleagues have directed.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bar reemployment of our former striking employees because they selected the severance or buyout option in the Strike Settlement Agreement reached January 16, 1993, or discharge our former striking employees solely because they selected the severance option.

WE WILL NOT discharge our former striking employees because they engaged in concerted protected activities protected under Section 7 of the Act.

WE WILL offer John A. Stano immediate reinstatement to his former or substantially equivalent position, discharging if necessary any employee hired to replace him, restore his seniority, and make him whole for any loss of wages or benefits he may have suffered as a result of our discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of John A. Stano, and inform him, in writing, that this has been done and that our unlawful action against him will not be used in any future personnel action involving him.

WE WILL mail a copy of this notice to each of our former striking employees who selected the severance option of the Strike Settlement Agreement.

HOUSE OF THE GOOD SAMARITAN

Doren G. Goldstone, Esq., for the General Counsel.
Richard N. Chapman, Esq., of Rochester, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on a charge filed by John A. Stano, an individual, on August 26, 1993, the Regional Director for Region 3 issued a complaint and notice of hearing alleging that House of the Good Samaritan (Respondent or Hospital) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's answer, inter alia, admits the jurisdictional allegations of the complaint.

Hearing was held in this matter in Watertown, New York, on May 10, 1994. Briefs were received from the parties on June 27, 1994. Based on the entire record, and my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a not-for-profit corporation, with an office and place of business in Watertown, New York, has been engaged in the operation of a hospital which provides health care and related services. I find that Respondent at all material times, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, Local 721 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues Raised for Determination by the Complaint and Answer*

The complaint alleges that:

(1) About January 16, 1993,[1] Respondent and the Union signed a strike settlement agreement.

(2) The terms of the strike settlement agreement described above included an option for an employee-striker to select an available position, have his name remain on a preferential hire list, or waive reinstatement and elect to take a buyout.

(3) About January 20, Stano elected the buyout option described above.[2]

(4) In late July, Stano applied for a position with Respondent.

(5) About August 2, Stano was hired by Respondent.

(6) About August 11, Respondent granted preference in terms and conditions of employment only to its employees and job applicants who had not elected the buyout described above.

(7) About August 11, Stano was discharged by Respondent.

(8) Stano was discharged by Respondent solely because he had elected the option described above.

(9) The conduct described above is inherently destructive of the employees' Section 7 rights, and by such conduct, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.[3]

While admitting the factual allegations set out above, Respondent denies the allegations that such conduct is unlawful. It also raises the following affirmative defenses:

(1) The strike settlement agreement was the product of collective bargaining between Respondent and the Union and it justifies the refusal of employment through October 31, 1994, of any person electing the buyout option.

(2) Respondent offered Stano the opportunity to change his election pursuant to the strike settlement agreement provided he repay the severance moneys he received from Respondent, and provided further that the Union agree to the restoration of seniority to Stano. Stano rejected this offer and is therefore disqualified from employment through October 31, 1994.

B. *Facts Leading to the Current Dispute*

House of the Good Samaritan is a community hospital and regional referral center for northern New York. It is a 300-bed facility located in Watertown, New York. An associated facility is the Samaritan Keep Home (Keep Home), a skilled nursing facility with about 300 beds caring for long-term care patients. Keep Home is a separate corporation with its own administrator and board of directors. However, its administrator reports to the CEO of the Hospital, and it has the

[1] All dates are in 1993 unless otherwise noted.

[2] This paragraph of the complaint and the one preceding it were amended slightly at the hearing to read as they appear here. Respondent had no objection and did not amend its answer.

[3] At the hearing, the General Counsel announced that the complaint as written and amended allowed two theories of violation of the Act by Respondent. First it allowed the finding of a violation under a *Great Dane* theory, and second, a finding that Respondent violated Sec. 8(a)(3) under a *Wright Line* analysis. (*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1975); *Wright Line*, 251 NLRB 1083 (1980).) Respondent contends that the *Wright Line* theory may not be asserted under the complaint. I disagree and point to par. VII of the complaint which I believe is broad enough to support a contention that Respondent violated Sec. 8(a)(3) by discriminating against Stano because of his activity of behalf of the Union. Additionally, Respondent was given advance notice that the General Counsel intended to pursue this theory and the factual basis supporting the *Great Dane* theory, without more, establishes a *Wright Line* violation of the Act.

same financial officer, human resource officer, and marketing and public relations officer as the Hospital. One of the employee units represented by the Union includes LPNs at both facilities. The Keep Home and Hospital share common direction in the matters of labor relations. I find that they are a single employer within the meaning of the Act. Respondent is currently involved in a collective-bargaining relationship with the Union and there is a collective-bargaining agreement in effect for two units of Respondent's employees, both expiring on October 31, 1994. Stano is a member of one of these units, the technicians' unit. The other involved unit is for the licensed practical nurses.

In February 1992, both units went out on a strike against the Hospital and the Samaritan Keep Home. The strike lasted about 11-1/2 months. Both of Respondent's facilities continued to operate during the strike utilizing permanent strike replacements. The Union conducted picketing on a daily basis during the strike and it was admittedly an emotionally charged strike. The strike garnered a large amount of media attention as the Respondent and Samaritan Keep Home were the only hospital facilities in Watertown. Stano appeared in several radio ads supporting the strike and was quoted in interviews by local papers concerning the strike. The Respondent's CEO, William P. Koughan, was the subject of personal verbal attacks by strikers, including Stano, during the strike. At the start of the strike, there were many strikers who were joined on the picket line by members of other unions and religious groups who supported the strike. By the strike's end, the number of picketers had dwindled considerably. Stano, however, was a striker who picketed regularly from beginning to end. Near that point in time, in November 1992, Koughan was invited to attend a meeting of strikers at a Watertown library. He attended this meeting and answered questions from a large audience composed of strikers and their families. Koughan testified that the audience was hostile and the questions critical. During this meeting, Stano approached the front of the room and, when about 20 feet from Koughan, made a speech against the Hospital's management and, when finished, exited to the applause of the audience. Koughan remembers Stano slamming the door as he left the room.

During the course of the strike a number of unfair labor practice charges were filed against Respondent which resulted in a hearing before the Board. After the hearing on the complaint which issued as a result of these charges, but before a decision issued, the Respondent and the Union entered into a strike settlement agreement and an initial collective-bargaining agreement, which resulted in the withdrawal of the unfair labor practice charges. There was also a pending injunction proceeding against Respondent in U.S. district court which was dismissed as a result of the settlement. The strike settlement agreement was negotiated in Washington, D.C. in January. Respondent's negotiating team included Koughan, its attorney Richard Chapman, its financial officer, its director of nursing, its vice president of support services, and Gerard Siuta, director of employee services. The Union was represented by attorney representatives of the Union.

As pertinent to this proceeding, the strike settlement agreement reached between the parties provided three options for strikers. First, an employee could choose a position from the ''position available list'' and return to work immediately. If no position was available, the striker could be placed on a preferential hiring list until October 31, 1994, at which time the list will expire along with the reinstatement rights of any remaining individuals on the list. Strikers placed on the preferential hiring list receive a $500 stipend for career advancement. Finally, a striker could choose a severance or ''buyout'' arrangement in lieu of selecting one of the other two options. The amount of severance payment was determined by years of seniority. Because of short seniority caused by a break in service at the Hospital which severely limited his chances at recall from the preferential hiring list, Stano elected the buyout option. His severance payment was $2000. For 15 or more years service, the payment topped at $5000. In addition to the severance payment, the option required that (a) the employee shall tender a letter of resignation, and (b) the employee shall surrender all reinstatement rights and shall not be retained on the preferential list. There is absolutely no bar to the voluntary rehiring of a striker by the Hospital in the strike settlement agreement as written, and there exist no side agreements or understandings between the parties which would vary the written terms of the strike settlement agreement.

C. *Stano Is Rehired by the Hospital*

Stano originally began work at the Hospital in 1978 as an emergency room technician and, in 1984, transferred to respiratory therapy. He worked in that department until 1988 when he voluntarily quit his employment. He returned to the employ of the Hospital in 1990 and worked until the strike, which he joined. After the strike ended, because of his break in service at the Hospital, he was the employee with the lowest seniority of returning strikers. As the right to return to work with respect to the first two options offered by the strike settlement agreement were based on seniority, and as it appeared that he had no chance of reinstatement to a position at the Hospital because of greater seniority of other strikers, he selected the buyout option. Consistent with the ''position available list,'' there were two part-time positions available in the department. These two positions were filled by Fran Ramie and Patrick Eckhard. There also was a respiratory technician senior to Stano, William McLennon, who opted to be placed on the preferential hiring list. At no time did the rehiring of Stano to a longstanding casual position affect the rights of any employee remaining on the preferential hiring list.

As required by the strike settlement agreement he filled out an option form, which in pertinent part reads:

> I elect to take the buyout as described and hereby resign my employment at HGS effective immediately. I waive my right to an available position or to have my name remain on a preferential hire list. I understand I will receive the buyout in amounts of $400 bi-weekly until paid in full. (3005 seniority in hours.) ($2000 expected buyout amount.) I further understand I will receive all accrued benefits including vacation, personal and sick pay; however, I shall individually decide and notify HGS/SKH whether I wish to receive my pension and 401(k) monies or have them continue to remain with the hospital until a later date. Signed John A. Stano, 1/20/93.

Stano testified that at the time he took the buyout option he had no intention of ever returning to work at the Hospital. However, in or about July, he learned of the existence of an opening for a casual position for which he was qualified in the cardiopulmonary department of the Hospital. He inquired about the position with Brad Eves, the head of that department. Eves confirmed that there was an open position and agreed to interview Stano for the job. In July he was interviewed by Eves and Day Supervisor Dave Suber, both of whom Stano knew from his previous employment.

On his job application form Stano noted as the reason for leaving his previous employment with the Hospital as ''union job action.'' Eves was aware that Stano was a former striker who had taken the buyout offer under the strike settlement agreement. Following the interview with Eves and Suber, Stano was told that they would have to check with the personnel office before he could be hired. Shortly thereafter, either Suber or Eves called Stano and told him that they also had to check with the Respondent's attorneys before he could be hired and that he would have an answer on his application within a few days.

Timothy Ryan has been the director of human resources for the Hospital since March and became involved in the Stano's hiring process. After Stano was interviewed by Eves, Eves contacted Ryan and asked if there was anything that precluded Stano from being rehired, noting that Stano had taken the buyout. Ryan told Eves that in his opinion the settlement did not preclude the rehiring of Stano. He gave this opinion after reviewing the collective-bargaining agreement and the strike settlement agreement. He also asked the Respondent's attorneys whether there was anything in the strike settlement agreement that precluded the rehiring of Stano and was told no. Ryan did not seek permission to rehire Stano from Koughan, nor did he ask for Koughan's personal understanding of the strike settlement agreement.[4]

Stano was contacted by Eves in late July and told he would be hired after he passed a physical examination. That occurred and Stano reported to work at the Hospital on July 29 and began an orientation course mandated by the State. His formal employment commenced August 2, when he was employed as a respiratory technician. There were about 12 to 14 other such technicians employed in this department. During the 8 or 9 days he worked at the Hospital, Stano was working 8-hour days to complete orientation. He had reached an understanding with Eves that his work schedule would be reduced to 6 days per pay period after orientation and he would work every other weekend. On the weekends he worked, he would be in charge of the department. However, these understandings never came to pass.

[4] Respondent elicited evidence that the human resources department was in a state of turmoil at about the time of Stano's rehiring. The Hospital had had a series of layoffs and most of the staff of the human resources department were new at their jobs, including Ryan. However, it appears to me that Ryan was very deliberate in his inquiry about any bar that existed to reemploying Stano, taking about a week to give an answer to Eves. Certainly there was no showing the Respondent's attorneys' offices were in a state of turmoil, and it was shown that Ryan's predecessor, who helped negotiate the strike settlement agreement, shared the view that it did not act as a bar to Stano's reemployment.

D. *Stano Is Fired by the Hospital*

Koughan was in the Hospital's cafeteria in August and saw Stano. He recognized him as a former striker who had taken the buyout. After confirming that indeed the person he had seen was Stano, he contacted Ryan and asked what Stano was doing in the Hospital. Ryan said he was a rehire and was working through an orientation program. Koughan told Ryan that Stano was not eligible for rehire because of the strike settlement agreement and that Ryan had made a mistake in rehiring him. He directed Ryan to fire Stano and he was fired on August 11. Koughan did not consult the Hospital's board of directors before ordering Stano's dismissal nor did he inquire about Stano's job performance.[5]

When making the decision to fire Stano, Koughan did not take into consideration nor did he look at the preferential hire list created by the strike settlement agreement. Koughan also considered the nature of the job for which Stano was rehired to be irrelevant to Stano's eligibility for rehire. Koughan's position in August was that Stano had taken the buyout and was thus permanently ineligible for employment at the Hospital. It made no difference to Koughan whether or not there were other respiratory technicians on the preferential hire list at the time Stano was rehired.

Koughan was asked by the General Counsel to point to the language in the collective-bargaining agreement or the strike settlement agreement which would support Koughan's view that Stano was barred from reemployment by the Hospital. For specific support, he referred to the language of the strike settlement agreement which is set out in this decision. He then stated that he was also thinking about the negotiations that took place in Washington, D.C., which created the strike settlement agreement.[6] He testified that there ''was no question in my mind that if a striker selected the severance buyout option, then that individual would not return to work.'' ''That is my understanding: That a person who accepted the severance option severed all relations with the hospital, resigned, and was not eligible to—to return to work. That was the purpose of the severance option as proffered by the SEIU.'' Inexplicably, Koughan describes the purpose of the buyout option as set out immediately above while further testifying that this matter was not discussed between the parties at the negotiations. At best all he could support his interpretation with is the fact that in his opinion, there were no representations made by the Hospital or the Union that affirmatively said that people who took the buyout option would be able to come back to work. Significantly, the buyout provision was a union proposal and Koughan admitted that the Union never proposed that strikers taking the buyout would be precluded from returning to the Hospital's employment. Although repeatedly asked, Koughan could not gave the Hospital's rationale for taking the position that strikers taking the

[5] When asked whether he knew that Ryan had been asked by Eves specifically about the eligibility of Stano for rehire given the fact he had taken the buyout, Koughan became evasive and attempted to give the impression that Ryan had not been presented with this inquiry.

[6] It was agreed by counsel in this proceeding that there were no side agreements or understandings between the Hospital and the Union which would vary or change the clear meaning of the collective-bargaining agreement or strike settlement agreement with respect to the issues involved here.

buyout would be permanently barred from working for the Hospital.

Gerard Siuta, until March 15, was the director of employee relations for the Hospital and held a comparable position with Keep Home.[7] He had held this position for about 2 years. In his position he was responsible for the labor relations of both the Hospital and Keep Home. He was involved in all of the negotiations which led to the current collective-bargaining agreement between Respondent and the Union and the negotiations for the strike settlement agreement. During the strike, he participated in management meetings presided over by Koughan. During many of these meetings, Koughan made the statement that the strikers who represented other strikers would not return to the Hospital, referring particularly to employee organizers Nancy Waters and Peggy Marshall.[8] Koughan vocalized his serious displeasure about the strike and the strikers during these meetings and was cautioned by Siuta to be careful about what he said.

Siuta testified that at some point in negotiations in Washington, D.C., the matter of whether employees taking the buyout could return to the Hospital was discussed internally by the management negotiating team. Siuta's position in these discussions was that such employees should be able to return. He stated that the resignation they would tender pursuant to the strike settlement agreement's buyout provisions was just like any other resignation, and they could reapply for reemployment and be judged for rehire on their work record. Siuta did not remember Koughan taking a position on this issue at the negotiations.[9] According to Siuta, the consensus of the team on this matter was that some of the strikers taking the buyout would eventually be rehired by the Hospital.[10] He noted that there are no restrictions against rehire in the strike settlement agreement, saying that the team did not believe it could get a settlement if such restrictions were placed in the agreement.

He also noted that Koughan and the Hospital's attorney often met privately with union negotiators at the Washington meetings. Koughan and the attorney would return from these meetings and report to the rest of the team what had been discussed in the private meetings. According to Siuta, the matter of employees who took the buyout being barred from reemployment was never the subject of these reports.

After the strike settlement agreement became effective, Siuta had the task of handling its implementation. Inter alia, this involved the preparation of a termination notice for those employees taking the buyout option. After Siuta completed part of this form, it was sent to the involved employee's department for an evaluation of the employee and a recommendation on whether the employee should be rehired in the future. After this was accomplished, the forms were returned to human resources and placed in the employee's personnel file. A termination notice was completed for Stano. As the reason for termination, it states ''voluntary separation as choice to strike settlement agreement.'' Under the portion of the form giving an employee evaluation at termination, Stano is rated at the next to highest rating, ''commendable,'' for each item for which a rating is given. The form in its original state had the block reading ''Would you rehire?'' marked ''Yes.'' The evaluation and the positive recommendation to rehire were placed on the form by Stano's former supervisor in the cardiopulmonary department, Brad Eves. At the time of Stano's termination or shortly thereafter, Siuta's successor, Timothy Ryan had the ''No'' block checked and a notice stapled to the termination form reading ''EMPLOYEE ELECTED BUYOUT, SEVERED EMPLOYMENT, THEREFORE, NOT SUBJECT TO REHIRE.'' Siuta testified that this prohibition against rehiring was not the policy of human resources when he was its head.

Koughan admitted that there have been instances where Hospital employees have resigned their employment at the Hospital and at a later date reapplied for employment. He is unaware of any policy of the Hospital which would bar the reemployment of such former employees and is certain that the Hospital has rehired former employees. Koughan believes that some former strikers who selected the preferential hire list have been rehired from the list. Other than Stano, Koughan was not aware of anyone who accepted the severance pay under the buyout provisions of the strike settlement agreement who has been rehired by Respondent. Koughan claimed that his position with respect to rehiring strikers who took the buyout would not be different if that person was someone other than Stano.

On the other hand, after Stano filed his charge with the Board, the Hospital modified its position on the matter of his eligibility for rehire. I should say that Koughan modified his position on this issue. There is no showing that anyone else with the Hospital who had a part in this matter believes that

[7] Siuta was fired by Koughan for reasons having nothing to do with issues involved in this hearing. He appeared at the hearing involuntarily under subpoena from the General Counsel. He appeared to be an entirely credible witness and I credit his testimony completely, and to the extent that it differs in any respect from that given by Koughan, I credit Siuta's version. Siuta gave rational and logical answers and appeared thoughtful and truthful. Koughan, on the other hand, often appeared hostile and less than candid.

[8] Koughan denied making these statements and noted that he had tried to find a position for Waters after the settlement had been reached. I credit Siuta's assertions about Koughan, and do not find it inconsistent for Koughan to try to get off to a good start with the Union by finding a job for one of its two main organizers. Koughan testified that he did not know what happened with respect to the position found for Waters. Marshall took the buyout option.

[9] On brief, Respondent asserts that ''Siuta testified, in fact, that Mr. Koughan 'probably made a statement to the effect that he would prefer not to have [strikers taking the severance package] return.'''' This is based on a passage in the Tr. 147 which reads:

> A. —Mr. Koughan probably made a statement to the effect that he would prefer not to have the folks return or could we do something like this?
>
> Q. You say ''probably'' that's a supposition?
>
> A. Yes. My recollection is not perfect.
>
> Q. You don't recall him saying that, do you?
>
> A. I can't say that for certain, no.

This passage was between Siuta as witness and counsel for Respondent as questioner. Having elicited an admission from Siuta that he really could not recollect with certainty that Koughan made such a statement, I do credit Respondent's reliance on such a statement on brief.

[10] After Siuta testified, Koughan was recalled to testify and testified that to his recollection there was no discussions among management that it would be inappropriate to make a proposal to the Union with specific language barring the rehire of strikers who had elected the severance package and there were no such discussions at any other time. I credit Siuta's testimony in this regard.

the strike settlement agreement bars the rehire of a former striker who took the buyout. In any event, Koughan's original position that taking the buyout by a striker would ''sever their relationship with the institution totally and completely'' changed on or about October 27. Koughan testified that he originally believed that taking the buyout severed a striker's relationship with the Respondent forever; however, after consideration of Stano's charge, he modified his ''forever'' belief to just the term of the existing contract with the Union.[11] On that date, Koughan sent Ryan a memo entitled ''Reemployment of LPN's and Technicians who elected severance and resignation option.'' The memo reads:

> In view of our discussion of the John Stano complaint, I believe that during the effective period of the Strike Settlement Agreement and the Preferential Hiring List (i.e., through October 31, 1994), the Hospital and Home should allow people who selected the severance arrangement to reverse their decision and elect to go on the Preferential Hiring List. This would have to be agreeable with SEIU, Local 721, and any such individual would have to return the severance payment which he/she received. Please follow up on this with Local 721 to assess its position.

Koughan explained that he feared that a number of other former strikers who took the severance payment might try to follow Stano's example. Although he conditioned his unilateral change in the terms of the settlement on union agreement, he never sought nor obtained such agreement.

Following this memo, Ryan wrote a letter to Stano dated November 5, wherein he offered to settle the unfair labor practice dispute. This letter reads:

> This will confirm that the House of the Good Samaritan offered to settle your NLRB charge by allowing you to reverse your choice of the severance arrangement you elected under the Strike Settlement Agreement and allowing you to be placed on the preferential hiring list, provided that this arrangement is agreeable to SEIU, Local 721.
>
> This would require you pay back to the Hospital the difference between the preferential hiring list stipend ($500) and the amount of severance you received ($2000), however, you would be credited with your seniority and remain on the preferential hiring list for its duration (October 31, 1994) or until you had received a position equivalent to that which you had prior to the strike. The settlement would also include you [sic] placement in a respiratory therapy technician position on casual status and you would withdraw your unfair labor practice charge filed with the NLRB.
>
> On October 29, 1993[12] you rejected this offer. The House of the Good Samaritan will vigorously contest your complaint to the National Labor Relations Board. If you wish to reconsider this offer at a later date, please feel free to contact me.

[11] The Union was not consulted on the unilateral modification of the strike settlement agreement.

[12] Complaint issued in this case on this date.

With respect to this offer of settlement, Ryan testified that he had made the same offer orally to Stano, who refused it. I find that Koughan's memo to Ryan and Ryan's subsequent oral offer and letter offer to Stano is nothing more than an attempt to settle this proceeding. Insofar as it purports to change the strike settlement agreement, it is a unilateral change without proper notification and negotiation with the Union. There is no evidence that the Union ever accepted this proposal and by its terms it requires union approval. Thus it is without effect. It is only included in this decision to demonstrate that Respondent continues to feel free to play fast and loose with its ''interpretation'' of the strike settlement agreement.

E. *Conclusions with Respect to the Complaint Allegations*

1. Is the Respondent's interpretation of the strike settlement agreement acting as bar to reemployment reasonable?

I believe it is clear from the record that the strike settlement agreement did not constitute a waiver of future employment opportunities for those strikers who elected the buyout option. Absent an express waiver, an employee has the right to be considered for reemployment free from discrimination. *Marlene Industries Corp*., 255 NLRB 1446 (1981); *Low Kit Mining Co*., 309 NLRB 501 (1993); *Monfort of Colorado*, 298 NLRB 73 (1990); *New Process Co*., 290 NLRB 704 (1988). The strike settlement agreement on its face clearly does not encompass waiver of future employment opportunities with Respondent. Stano, because his seniority position would not allow him to obtain a position with the Hospital under the other options, selected the severance or buyout option. Under this option he was paid a severance payment in the amount of $2000. For 15 or more years' service, the payment topped at $5000. In addition to the severance payment, the option required that (a) the employee shall tender a letter of resignation, and (b) the employee shall surrender all reinstatement rights and shall not be retained on the preferential list.

Any waiver by Stano of future employment rights with the Hospital are covered by the language in (b), above. Language similar to this language in the strike settlement agreement which refers to ''waiver of reinstatement'' has been interpreted by the Board in other cases not to preclude future employment opportunities. *Host International*, 290 NLRB 242 (1988); *Universal Textured Yarns*, 203 NLRB 713 (1973); *Adams Mill Texturing Plant*, 209 NLRB 899 (1974). There were no contemporaneous side agreements between Respondent and the Union which would vary the plain meaning of the written agreement.

That the meaning is clear can be seen from the fact that the only person involved in this proceeding contending that the strike settlement agreement operates to bar Stano's employment is Respondent's CEO Koughan. I firmly believe that this personal interpretation of the strike settlement agreement is more wishful thinking resulting from animus than good-faith belief. Siuta credibly testified that during negotiations over the strike settlement agreement, this concept was rejected in caucus by management's negotiating team as not being a viable option. Koughan admitted that it was not discussed by the Respondent and the Union during negotiations.

After the settlement was agreed to, its implementation is consistent with the position that the buyout option was not a bar to future employment. Stano's termination notice was processed in the same manner as any employee voluntarily terminating employment with the Hospital. It was sent to his supervisor for an evaluation and recommendation for future reemployment. Ryan, the human resources director at the time Stano applied for rehire, found nothing in the strike settlement agreement barring Stano's rehire. Significantly, he checked with Respondent's attorneys who participated in negotiations for the settlement and was not told that the strike settlement agreement barred Stano's reemployment by the Respondent.

Moreover, the Union prepared the form which was used by employees selecting among the various options offered in the strike settlement agreement. The Union's form, which was found acceptable by the Hospital, does not in any way suggest that there was a waiver of future employment rights. The form states:

> (3) I elect to take the buyout as described and hereby resign my employment at HGS effective immediately. I waive my right to an available position or to have my name remain on a preferential hire list.

Based on the foregoing discussion, I find that Respondent and, in particular, Koughan, did not have a good-faith belief that strikers electing the buyout option had waived their right to future employment at the Hospital and that such an interpretation of the strike settlement agreement is wholly unreasonable.

2. Is Respondent's interpretation of the strike settlement agreement inherently destructive of employee rights?

While the Board and the Courts have typically found that violations of Section 8(a)(3) of the Act occurred in situations where the discriminatory conduct was motivated by an antiunion purpose, the Supreme Court in *NLRB v. Erie Resister Corp*., 373 U.S. 221 (1963), concluded that certain employer conduct, because of the destructive nature of the conduct itself, carries with it its own indicia of unlawful intent. In such instances, the employer is held ''to intend the very consequences which foreseeably and inescapably flow from his actions . . . [because] his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended.'' Id. at 2124.

Thus the Supreme Court gave the Board the responsibility to balance the interest of employees to be permitted to engage in concerted activity free of discriminatory conduct against the possible interest of an employer to operate its business in a particular manner. In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court set forth the basic rules concerning the burden of proving the presence or absence of discriminatory purpose under Section 8(a)(3). In *Great Dane*, supra, the Supreme Court established two general classes of conduct. The Court found that if it could be concluded that the employer's discriminatory conduct was ''inherently destructive'' of important employee rights, no proof of antiunion motivation needed to be advanced by the General Counsel, and a violation would be found despite evidence of business justification. On the other hand, where the discriminatory conduct had a ''comparatively slight'' effect on employee rights, employer evidence of ''legitimate and substantial business justification for the conduct'' shifts the burden of proof to the General Counsel to show specific antiunion motivation. Id. at 2469.

The Board has found that the ''inherently destructive'' standard applies to situations where there was a failure to recall former union-represented employees at the time of resuming operations. *Rushton & Mercier Woodworking Co*., 203 NLRB 123 (1973). Similarly, the ''inherently destructive'' standard was applied where an employer refused to rehire employees because they had served as union stewards. *Northeast Constructors*, 198 NLRB 846 (1972). The same standard was applied where an employer treated returning strikers as new employees for insurance purposes and assigned them to less desirable shift work. *Moore Business Forms*, 224 NLRB 393 (1976).

I believe that in the instant case, Respondent's effort to preclude future employment opportunities for employees who took the buyout would ''naturally and foreseeably'' have an adverse effect on important employee rights since employees would be less likely to strike, or cooperate in reaching settlement of an ongoing dispute, if it appeared that they could then be barred from any future employment with that specific employer.[13] Protection of the right to strike and to be free of discrimination as a result of that activity is one of the basic underpinnings of the Act. *Erie Resistor*, supra. This is especially true where as here, Respondent has the only Hospital in the area and has permanently replaced the large majority of the striking employees. Only those with substantial seniority could reasonably hope to be returned to their former jobs by electing to be placed on a preferential hiring list. In the circumstances, almost half of the striking employees elected to take the severance option.[14] To permanently preclude any future employment at the Hospital for this large number of employees in the circumstances of this case certainly seems to me to be ''inherently destructive'' of the striking employees' rights and would have the direct effect of curtailing these employees' rights to engage in protected,

[13] On brief, Respondent makes the disingenuous argument that its conduct here cannot be ''inherently destructive'' of employee rights because Stano chose the severance option rather than the right to return to work or be placed on the preferential hiring list. It states, ''While it is true that an individual who was not part of the bargaining unit at the time of the strike could presently be hired and Mr. Stano cannot, Stano, unlike other applicants, received $2000 from the Employer for relinquishing his rights to reemployment.'' ''Thus, unlike a case of inherently discriminatory conduct, the impact on Stano's and other similarly situated employee's rights to reinstatement was not caused by the Employer, but by the employee's conscious choice.'' This argument fails for two reasons. First, given the small number of open positions available to return to, the large number of strikers, and Stano's seniority, there really was little, if any, freedom of choice available to Stano. Second, and most important, Stano was not informed that by accepting the severance payment that he was forever relinquishing his right to reemployment. This consequence of selecting the severance option was known only to Koughan and was made public only after Stano's reemployment. An uninformed choice is no choice at all.

[14] Having found that Respondent's conduct is ''inherently destructive'' of employee rights, I obviously find that such conduct would have a ''comparatively slight'' discriminatory effect on those rights.

concerted activity and may further have a chilling effect on the exercise of these rights by other employees. I again note that Respondent's interpretation of the strike settlement agreement can find no home in that agreement nor in any other agreement between the Union and Respondent. Thus, its interpretation is virtually unilateral and would clearly have the effect of undermining employee confidence in the Union and the Act.

Recognizing however, the reluctance of the Board and the Courts to find employer conduct ''inherently destructive,'' I would find that under a *Great Dane* analysis, even if the Respondent's conduct in this case is viewed as having a ''comparatively slight'' discriminatory effect on its employees' rights, the Respondent has totally failed to establish a legitimate and substantial business justification for its conduct.[15] As noted in my factfindings, Koughan could offer no rationale for his ''interpretation'' of the strike settlement agreement that bars reemployment of strikers selecting the severance option. The best I can glean from his testimony is that having paid from $2000 to $5000 to those employees selecting this option, he does not feel he is getting his money's worth if they can be reemployed. On brief, Respondent argues that ''The Employer, based on these negotiations, the different types of options offered in the Agreement and the use of the term 'severance' in the Agreement understood the Agreement to mean that employees who elected the buyout were ineligible for future employment with the Hospital. The Employer is entitled to the benefit of its bargain.''

In this regard, one must consider Siuta's credible testimony that during negotiations the management team considered offering language to the Union's severance proposal which would have barred future employment rights of employees selecting the option. They rejected this approach as not viable as it may have precluded the possibility of settlement. Having made this choice, this consequence of selecting the severance option was not discussed between the parties, and thus, there was no ''bargain'' between the parties in this regard. Certainly, the cost of barring future employment in the strike settlement agreement would have cost far more that simply giving up the right to reinstatement immediately or from the preferential hiring list. What the affected employees gave up for the severance payment was the right to be either reinstated immediately or in Stano's case, to be placed on a preferential hiring list and therefore have an enforceable right to positions as they became available. Moreover, Stano waived the right to go into a position with his seniority intact. Stano's reemployment in the cardiopulmonary department was into a casual position as a new employee without any seniority rights.

As the General Counsel correctly points out, the record ironically establishes that the legitimate business needs of the Respondent would require *retaining* Stano as an employee to fill one of several longstanding open positions within the cardiopulmonary department. Having found that the Respondent has failed to demonstrate that its interpretation of the strike settlement agreement is reasonable or to demonstrate any legitimate and substantial business justification for its conduct here, I find that it has violated Section 8(a)(3) and (1) of the Act. *Great Dane*, supra.

3. Did the termination of Stano by Respondent constitute a *Wright Line* violation of the Act?

Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the burden of establishing a prima facie case to support the inference that the employee's protected conduct was a ''motivating factor'' in the employer's decision. To establish a prima facie case, the General Counsel must show the existence of protected activity, the employer's knowledge of that activity, and evidence of union animus. If the General Counsel establishes a prima facie case, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. I believe that the General Counsel has met his burden and Respondent has failed to do so.

The Respondent admits that Stano engaged in protected conduct and that it had knowledge of that conduct. I believe animus is readily established in this record. I have heretofore found that Respondent's stated reason for discharging Stano is its interpretation of the strike settlement agreement and that that interpretation is not based on a good-faith belief nor can it be deemed reasonable under the wording of the agreement. Having no rational basis for its interpretation, and as action based on the interpretation is aimed only at former striking employees and, in particular, Stano, I find that Respondent can only be acting from antiunion animus caused by Stano's protected activity, i.e., engaging in the strike. Further, according to the credible evidence, Koughan was strongly displeased with the strikers and had at least one unpleasant confrontation with Stano at the meeting in November. The evidence also reflects that Stano was an active participant in the strike and picketed to the end, when his presence was even more noticeable as the number of picketers had diminished to a few. I find it significant in this regard that the first time Koughan saw Stano in the Hospital, he recognized him and knew he had taken the severance option. Considering that there were over a hundred strikers affected in one way or another by the strike settlement agreement, and that Koughan had only been in his position or a related one for about a year when the strike commenced, Stano must have made a real impression on Koughan for him to not only recognize Stano, but know that he took the severance package.

Stano was shown to have been a good employee, deemed ''commendable'' by his supervisor Eves and recommended for reemployment by Eves at the time of Stano's voluntary termination. At the time of his involuntary termination, Eves had placed him in charge of the department on weekends. However the quality of Stano's work performance, or the need of the cardiopulmonary department to fill a long vacant position did not enter Koughan's mind. He saw a striker who had taken the buyout and wanted him out of the Hospital. I believe that such a knee jerk reaction is only indicative of animus based on Stano's protected conduct of engaging in the strike.

As I have found in the previous section of this decision, Respondent has wholly failed to demonstrate any legitimate and substantial business reason for its decision to terminate Stano. As I there noted, the only rational business decision that could be made with Stano would have been to retain

[15] Having found that Respondent's conduct is ''inherently destructive'' of employee rights, I obviously find that such conduct would have a ''comparatively slight'' discriminatory effect on those rights.

him. I do not believe this is a mixed motive case. I believe Respondent terminated Stano and interpreted the strike settlement agreement in the manner it did purely out of animus. Accordingly, I find that its actions in this regard violate Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct inherently destructive of rights guaranteed employees by Section 7 of the Act by discharging Stano on August 11, 1993, because

(a) Stano engaged in a strike against Respondent.

(b) Stano elected a severance payment option contained in a strike settlement agreement which allowed a striker to accept a severance payment in return for waiving reinstatement, not being placed on a preferential hiring list, and resigning his employment with Respondent.

(c) Respondent unreasonably, in bad faith, and without legitimate and substantial business justification, interpreted the severance option of the settlement agreement to bar future reemployment of those strikers, including Stano, selecting this option.

4. By engaging in the conduct described in paragraph 3, above, Respondent is engaging in conduct in violation of Section 8(a)(3) and (1) of the Act.

5. By discharging Stano on August 11, 1993, because Stano engaged in protected concerted activity, Respondent is engaging in conduct in violation of Section 8(a)(3) and (1) of the Act.

6. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent is engaging in conduct in violation of Section 8(a)(1) and (3) of the Act, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has unlawfully discharged its employee John A. Stano on August 11, 1993, it is recommended that Respondent be ordered to offer him immediate reinstatement to his former or substantially equivalent position, discharging if necessary any employee hired to replace him, restore his seniority, and make him whole for any losses of wages or benefits he may have suffered as a result of Respondent's discrimination against him. Backpay should be computed pursuant to the Board's formula as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that Respondent be ordered to remove from its files any reference to the unlawful discharge of Stano, and inform him, in writing, that this has been done and that its unlawful action against him will not be used in any future personnel action involving him. Because of the wide-reaching effects of Respondent's conduct, I further recommend that it be ordered to inform, in writing, each of its former employees who selected the severance option of the strike settlement agreement that they are not ineligible for reemployment by Respondent solely because they selected this option.

Based on the foregoing findings of fact, conclusions of law, and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, House of the Good Samaritan, Watertown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Barring reemployment of former striking employees solely because they selected the severance or buyout option in the strike settlement agreement reached January 1, 1993, or discharging former striking employees solely because they selected the severance option.

(b) Discharging its former striking employees because they engaged in concerted activities protected under Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer John A. Stano immediate reinstatement to his former or substantially equivalent position, discharging if necessary any employee hired to replace him, restore his seniority, and make him whole for any loss of wages or benefits he may have suffered as a result of Respondent's discrimination against him, with interest, as set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge of Stano, and inform him, in writing, that this has been done and that its unlawful action against him will not be used in any future personnel action involving him.

(c) Inform, in writing, each of its former employees who selected the severance option of the strike settlement agreement that they are not ineligible for reemployment by Respondent solely because they selected this option.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Watertown, New York, copies of the attached notice marked ''Appendix.''[17] Copies of this notice, on forms provided by the Regional Director for Region 3, shall be signed by Respondent's authorized representative and posted by it immediately upon receipt for 60 consecutive

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that these notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.